Supreme Court, U.S.
FILED

No. 99 169 JUL 26 1999

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IN THE

Supreme Court of the United States

TIMOTHY SCHOLZ,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1. Does the Oklahoma Child Abuse Reporting and Prevention Act's failure to define the term "injury" in the Act's prohibition of any "physical or mental injury" for the purpose determining of whether a child is "deprived" or not, and subject to removal from a parent's home, when other provisions of Oklahoma law specifically permit corporal punishment by parents, render that portion of the Act unconstitutionally vague in violation of the Fourteenth Amendment to the United States Constitution when the result of the Act's application is to remove a parent's children from the home for over two years? To phrase the question another way, is it impossible to read the two statues together, one allowing corporal punishment, the other proscribing any injury to a child, as the Oklahoma Court of Appeals attempted to do, or does the attempt to do so render the resulting construction unconstitutionally vague in violation of the Fourteenth Amendment to the United States Constitution?

2. Does the use of the Oklahoma Abuse Reporting and Prevention Act to adjudicate two children as deprived for a single act of corporal punishment on one child, when the punishment results in a minor bruise on just one child, constitute an unconstitutional infringement on the fundamental right to family integrity when the result of such an adjudication is to, in effect, permanently remove both of a natural father's children from his home?

3. Did the failure of the trial court to allow evidence, in a deprived child action, outside the scope of the single incident of corporal punishment of Petitioner's child, deny him Due Process and a fair hearing in violation of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the two children involved in the proceeding, Melvina Mae Scholz and Crystal Lynn Scholz, were represented by counsel at the trial court level by:

Shanon Shirley, *Esq.*
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Anita Scholz, the children's natural mother, was represented by:

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Neither of these parties participated beyond the trial court level.

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Petitioner Timothy Scholz respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Oklahoma denying a writ of certiorari to the First Division of the Oklahoma Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Oklahoma Court of Appeals was initially released for publication by Division One of the court on March 10, 1998 (App. A). After initially accepting review by way of Certiorari to the Supreme Court of the State of Oklahoma (App. E), the Supreme Court withdrew its order granting Certiorari on April 27, 1998, and withdrew the aforementioned opinion of the Oklahoma Court of Appeals from publication (App. D).

STATEMENT OF JURISDICTION

The order of the Supreme Court of the State of Oklahoma was entered on April 26, 1999 (App. D).

The jurisdiction of this Court in invoked under 28 U.S.C. § 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Oklahoma Statutes

10 O.S. Supp. 1995 § 7102(A)

> It is the policy of this state to provide for the protection of children who have had physical

injury inflicted upon them and who, in the absence of appropriate reports concerning their condition and circumstance, may be further threatened by the conduct of persons responsible for the care and protection of such children.

10 O.S. Supp. 1995 § 7102(B)

As used in the Oklahoma Child Abuse Reporting and Prevention Act:

> 1. "Abuse and neglect" means harm or threatened harm to a child's health or welfare by a person responsible for the child's health or welfare;
>
> 2. "Harm or threatened harm to a child's health or welfare" includes but is not limited to nonaccidental physical or mental injury; sexual abuse; sexual exploitation; or negligent treatment or maltreatment including by not limited to the failure or omission to provide adequate food, clothing, shelter, or medical care or protection from harm or threatened harm;

21 O.S. § 844

Ordinary force as a means of discipline not prohibited

Provided, however, that nothing contained in this act shall prohibit any parent, teacher or other

person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling.

Constitutional Provisions

The First Amendment to the United States Constitution provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Ninth Amendment provides that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment provides, in relevant part, that no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The fundamental questions in this case revolve around the right of a parent to spank his child as punishment, and whether a single, isolated instance of corporal punishment justifies the State's removal of not only the punished child but another child who observed the spanking. Supporting the State's interference is the "Oklahoma Child Abuse Reporting and Prevention Act," which, in its stated purpose, strives to protect children from the infliction of "injury" by any caretaker and permits the adjudication of such injured children as abused and, consequently, deprived.

Unfortunately, the Act does not specifically define "injury" for the purposes of the Act's application, making the interpretation of the applicable standard for "injury" difficult to interpret. This difficulty is compounded by the existence of a statute in Oklahoma which clearly allows the use of "spanking, switching or paddling" as means of punishment.

The trial court interpreted the term "injury" very narrowly, excluding any evidence as to what the minor child was doing during the spanking that may have caused whatever injury that was alleged to have occurred. For example, Melvina Scholz was prone to use physical violence and in her efforts to resist her father's spanking she may have rolled of a bed and injured her head. The trial court excluded all evidence outside the spanking, including relevant evidence of the good home provided by Petitioner, holding that if the child was "injured," the child was deprived, regardless of the circumstances or cause.

A. Background.

On March 4, 1997, the District Attorney of Creek County filed a Petition alleging that Melvina Mae Scholz and Crystal Lynn Scholz were "deprived children" due to physical abuse at the hand of Timothy Scholz, the Petitioner herein. The Petitioner had spanked Melvina Mae Scholz on February 5, 1997. Crystal Lynn Scholz was present, but not spanked. The children were not initially removed from the home, however. After the initial complaint, prior to the filing of the petition, the two girls ran away from home when the children realized that D.H.S. was not going to take any immediate action. The girls stayed with relatives for two weeks. When Petitioner tried to pick up his children, the Department of Human Services took the girls into

protective custody and a petition alleging that the children were deprived under Oklahoma law was filed in Creek County, Oklahoma. This was a month after the date of the alleged abuse.

Petitioner requested a trial, at which only one issue addressed — the severity of Melvina's spanking. There was no dispute that this was an isolated incident or that Melvina was the only child who received a spanking. The trial court restricted the evidence that was presented to the jury solely to the administration of the spanking, and would not allow any testimony as to provocation, resistance, or the general nature of the children's home, which did not support the contention of the State that the children were deprived. Petitioner's admitted to spanking his child, but claimed that Melvina had not been injured at his hand, and if she was hurt at all, it was by her resistance and contention with her father. Nonetheless, the jury adjudicated both children as deprived on April 24, 1997, and the children were never returned to their father. In the instructions to the jury, the term injury was not defined, but the jury was told that "Oklahoma law prohibits the infliction of physical injury to a child as a means of discipline." The jury was not instructed that Oklahoma law allowed for the use of "ordinary force" as discipline, such as "spanking, switching or paddling." 21 O.S. § 844. As of the date of the filing of this petition, the children remain in the legal custody of the Oklahoma Department of Corrections and reside with their natural mother in another city.

B. The Proceedings Below.

After the trial court denied Petitioner's request for a new trial, he appealed to the Oklahoma Court of Appeals.

Among other evidentiary issues, Petitioner argued in his second proposition of error that the trial court's application of "injury" rendered the trial indistinguishable from a criminal assault and battery case, depriving him of due process and a fair hearing. He also argued that the narrow definition that the trial court attached to the term "injury" deprived him a right to present a defense — that his home was adequate for raising children, that the child were well fed and cared for and that any injury that may have been suffered by Melvina Scholz was caused by her contention and resistance and not his punishment. In a very close two-to-one decision, a single judge wrote the opinion of the court affirming the trial court decision finding that any "injured" child is "abused" and subject to removal from the home. The Act does not even limit the injury to those that occur at the hand of a parent. In a specially concurring opinion, Judge Jones felt the "legislation in question . . . to be unwise," but believed that the matter should be handled by the legislature. In a brief but scathing dissent, Judge Garrett voiced the opinion that Petitioner had been denied a fair trial due to the trial court's limited application of the Act, and felt that the matter should be reversed and remanded for a new trial. Petitioner requested a rehearing, which was denied.

Petitioner then sought certiorari relief with the Oklahoma Supreme Court. The issues raised in this petition were distilled in the single question of whether the Oklahoma Court of Appeal's interpretation of the Act violated a parent's right to due process when a child can be adjudicated as deprived for bruising, or simply observing bruising on a sibling. Further, in the body of the outline of reasons for review, Petitioner complained that the absence of any definition of "injury" in the Act rendered it

unconstitutionally vague. His petition was initially granted, but the decision to accept certiorari was withdrawn as "improvidently granted" on April 26, 1999. The Supreme Court of Oklahoma went even further, withdrawing the previously published decision of the Oklahoma Court of Appeals from publication. No other explanation was given for this dramatic change of heart.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE OKLAHOMA COURT CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE ISSUE OF THE CONSTITUTIONALITY OF A VAGUE STATUTE.

The challenged statutory provisions of the Oklahoma Child Abuse Reporting and Prevention Act are unconstitutionally vague. As stated in *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 (D.C.S.D. Iowa 1975):

> Nevertheless, Due Process requires the state to clearly identify and define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in terminating the parent-child relationship.

Alsager, 406 F. Supp. at 21.

The "void-for-vagueness doctrine" requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." *Smith v. Goguen*, 425 U.S. 566 (1974). The fact that the statue at issue in this case is not a criminal statue is of no consequence. This Court has repeatedly noted that taking a child away from a parent has a greater impact than the penalties associated with a vagrancy statute, which is entitled to the same vagueness analysis. Additionally, although Petitioner's parental rights have not been terminated, it should be noted that for all practical purposes, he has no rights with regard to his children at this time. He hasn't seen them outside of a courtroom setting for over two years, and the Oklahoma Department of Human Services controls his right, or lack thereof, to ever see his children. He has suffered a *de facto* loss of his parental rights.

The *Smith* decision addressed flag contempt statutes, which have been characterized as void for lack of notice on the theory that "[w]hat is contemptuous to one man may be a work of art to another." *Smith* at 574. Likewise, the kind of corporal punishment at issue in this case could be termed "abuse" by one person, and "strict discipline" by another. The attempt by the legislature to define "abuse" as "harm or threatened harm," and then including in the enumerated types of harm "nonaccidental physical or mental injury" does not cure the vagueness of the statute, especially in light of another statutory provision in Oklahoma providing for spanking. In this case, presumably, the jury found that Crystal Lynn Scholz had suffered some sort of "mental injury" while observing her sister's spanking. What is mental injury? Must the injury be of a permanent nature? Does upsetting a child constitute "mental injury?" The terms of the law are too vague to be sure.

Vague statues carry three dangers: the absence of fair warning, the impermissible delegation of discretion, and the undue inhibition of the legitimate exercise of a constitutional right. The initial danger, absence of fair warning, is illustrated by the fact that Oklahoma law, by statute, permits the use of "spanking, switching or paddling" by a "parent, teacher, or other person." 21 O.S. § 844. The Act, on the other hand, strives to protect children from the infliction of mental or physical "injury" by any caretaker and permits the adjudication of such children as abused and, consequently, deprived. 10 O.S. Supp 1995 § 7102. Unfortunately, the Act does not specifically define "injury" for the purposes of the Act's application.

In *Roe v. Conn*, 417 F. Supp. 769 (D.C. Ala. 1976), the federal court addressed a similar problem in that the statutory definition of neglect was circular — a neglected child is any child who has no proper parental care by reason of neglect. The definition was also couched in terms that had no common meaning. *See Connally v. General Construction Co.*, 269 U.S. 385 (1956). When is a home an "unfit" or "improper" place for a child? When does a spanking, switching or paddling cause injury? When it hurts? When it leaves a red mark? A bruise? Obviously, these questions are such that men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The second danger present in a vague statue is the impermissible delegation of discretion from the state legislature to the state law enforcement body. In this case, the Oklahoma Department of Human Services is given

almost unfettered discretion when it comes to enforcing the provision of the Act. Vague laws also impermissibly delegate basic policy matters to ". . . juries for resolution on an *ad hoc* basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109. How could the jury in this case determine if the children were injured without an instruction defining the term?

Finally, the third danger present in a vague statute is the risk that the exercise of constitutional rights will be inhibited. While the parental rights of the Petitioner herein have not yet been terminated, he has effectively lost all rights attendant to those associated with a parent — he cannot visit his children when he wants to or have any direction in their upbringing. All decisions relating to his rights and obligations are at the direction and the pleasure of the Oklahoma Department of Human Services. In fact, once the Oklahoma Department of Human Services decided to place the children with their natural mother, the trial court, on June 23, 1997, relying of the reports of the Oklahoma Department of Human Services, advised the parents, as well as all adults living in each parent's home to:

1. Complete a psychological assessment and follow recommendations for treatment;

2. Complete Substance Abuse Assessment and follow recommendations;

3. Complete Domestic Violence counseling and treatment;

4. Complete a comprehensive parenting course.

Additionally, the trial court felt satisfied that Melvina Scholz had a problem with violent behavior and ordered domestic violence counseling. The parents were informed that there was to be no spanking or corporal punishment of the children while they were in the custody of the Department of Human Services. Finally, and perhaps most remarkably, the trial court advised the child's natural mother that her relationship with her boyfriend was unacceptable to the court and the she expected her to "get married" within ninety days or that he would have to leave the house.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE OKLAHOMA COURT CONFLICTS WITH THIS COURT'S PRIOR RULINGS LIMITING THE ABILITY OF GOVERNMENT TO INTERFERE WITH THE FUNDAMENTAL RIGHT TO FAMILY INTEGRITY.

The seminal case in the constitutional development of the recognized fundamental right to family integrity protected by the Fourteenth Amendment to the United States Constitution is *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer*, the Supreme Court of the United States held that the "liberty" guarantee of the Fourteenth Amendment "without doubt . . . denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* at 399. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court again recognized the liberty of parents to direct the rearing and education of children, and in

Prince v. Massachusetts, 321 U.S. 158 (1944), the Supreme Court stated:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder * * * and it is in recognition of this that these decisions [*Meyer* and *Pierce*] have respected the private realm of family life which the state cannot enter.

321 U.S. at 166.

A more recent Supreme Court decision, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), reaffirms the constitutional nature of this interest: "freedom of personal choice in mothers of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment." In addition to the "liberty" concept of the Fourteenth, the Supreme Court has been equally solicitous of the family enclave under the doctrine of privacy. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court declared unconstitutional the Illinois dependency statute that deprived an unmarried father of the care and custody of his natural children upon the death of their mother. In doing so, the Court held that the right to the integrity of the family unit was protected by the Fourteenth Amendment Due Process and Equal Protection clauses and by the Ninth Amendment. *Stanley* at 651.

When the government has effectively severed the parent-child relationship under the guise of a statutory provision granting a state the authority to do so, the

constitutionality of the statute must receive strict judicial scrutiny. *See Roe v. Wade*, 410 U.S. 113 (1973). Although Petitioner's parental rights have not yet been terminated, he has not had meaningful contact with his children outside of a courtroom setting for two years. This constitutes an effective termination of his parental rights for the purpose of this Court's review.

On direct appeal, Petitioner argued that it was error to exclude all evidence other than that relating to the allegation that he had spanked his child. All other facts, such as the condition of the home, whether the incident was isolated and any actions of the child were deemed irrelevant. The State contended, and the jury believed, that since the evidence was uncontradicted that Petitioner had spanked his child that the only issue to be determined was whether or not he spanked her too hard, that is, whether she suffered "injury" as a result of the spanking. As stated in *People in Interest of M.A.I.*, 553 P.2d 103 (Colo. App. 1976),

> If we were to adopt the statutory interpretation urged by the People, the mere application of a parent's hand to a child's backside, which results in even minimal bruising would, as a matter of law, require a finding of neglect or dependency. Such a result would preclude any explanation or consideration of the reasonableness of the act which caused the bruising. We do not perceive that the legislature intended such a result.

People in Interest of M.A.I. is cited for the reason that the facts are almost exactly like those before this Court. It was brought out in the presentation of the People's case that the appellant's explanation for the bruises on the child

was that he had disciplined his children by corporal means, utilizing a belt strap, and that he did not consider the punishment to be unreasonable.

The "temporary" removal of the children from the natural father's home has simply gone on too long to comport with standards of Due Process. While it cannot be doubted that the State seeks to further a legitimate interest when it sets out to protect the welfare of its citizens of a tender age, these interests are less compelling once the immediate action of removal has been taken in order to protect a child from harm in an emergency situation. As stated in the *Alsager* decision,

> The state's interest in protecting a child from future harm at the hands of his or her parents is clearly less compelling in a situation where the state has already obtained temporary protective custody over the child than in those cases where the supposedly threatened child remains in the parents' home.

Alsager, 406 F. Supp. at 22.

CONCLUSION

It is respectfully suggested that this Court accept review by Certiorari to examine the propriety of a statute empowering the Department of Human Services, through the District Court system in Oklahoma, with virtually unbridled authority to take children out of their home into State custody. While in the legal custody of the Oklahoma Department of Human Services, Melvina Scholz has given birth to a child while in the ninth grade. Crystal Scholz is having difficulty in the sixth grade, having received several "F" grades over the course of the year. The benefits of the Department's supervision are questionable. While the parental rights of Petitioner have not yet been terminated, an application to do so was filed by the State of Oklahoma on June 9, 1999, and at this point, termination seems inevitable.

While Petitioner had the right to have a jury ultimately determine issues relating to the appropriateness of the Government's decision, the right to obtain judicial review has been rendered a nullity in Oklahoma due to the Oklahoma Child Abuse Reporting and Prevention Act's failure to adequately define the terminology on which the decision to remove a child from the home is based.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION NO. I DATED AND FILED MARCH 10, 1998

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION NO. I

Case No. 89,784

IN THE MATTER OF M.M.S. and C.L.S.,
alleged deprived children,

STATE OF OKLAHOMA,

Plaintiff/Appellee,

vs.

TIMOTHY SCHOLZ,

Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT OF
CREEK COUNTY, OKLAHOMA

HONORABLE APRIL SELLERS WHITE, JUDGE

* * *

Opinion by Larry E. Joplin, Judge:

¶1 Timothy Scholz (Father) seeks review of the trial court's order entering judgment on jury verdict adjudicating

Appendix A

Father's two minor children, M.M.S. and C.L.S. — fourteen and ten years old respectively — deprived. In this appeal, Father challenges the trial court's admission of evidence regarding bruising on M.M.S.; exclusion of evidence of provocation by M.M.S.; and exclusion of evidence by a third party that M.M.S. had orchestrated the entire scenario in order to live with her biological mother who had been heretofore unable to obtain custody of the two minor children. Finding no reversible error, we affirm.

¶2 Father obtained custody of and lived with his two daughters, M.M.S. and C.L.S. Thereafter, Father married Shirley in 1996. In February 1997, an altercation arose between M.M.S. and Father during which Father admittedly struck M.M.S. with a belt. A school counselor testified she observed bruises on the arm of M.M.S., informed the Oklahoma Department of Human Services (State) which, after a conference with M.M.S., determined M.M.S. had been "injured." Nevertheless, State did not "remove" either M.M.S. or C.L.S. from the home until several days later when the children allegedly ran away.

¶3 Thereafter, State commenced the instant action alleging M.M.S. and C.L.S. to be deprived under the Oklahoma Child Abuse Reporting and Prevention Act (a/k/a the Ryan Luke Bill, hereinafter simply, the Act), 10 O.S. 1995 §7101 et seq. The Act essentially provides that if a child sustains "injury," the child is "abused" by statutory definition, and may be adjudicated deprived and declared a ward of the court. Father vehemently denied injuring his children, although admitting to administration of discipline to M.M.S., his older daughter, upon extreme provocation and

a calculated plan upon the part of M.M.S. to leave Father's residence and reside with mother and her paramour.

¶4 The trial court sustained State's motion in limine prohibiting any reference to alleged provocation and/or any plan on the part of M.M.S. to cause custody to be vested in mother. Upon consideration of the allowed evidence, the jury returned a verdict finding M.M.S. and C.L.S. deprived. Father moved for new trial which was overruled, and Father now appeals.

¶5 Father's three propositions of error challenge the admission and/or exclusion of evidence. Specifically, Father first claims the trial court erred in allowing testimony regarding the existence of bruising on the arms of M.M.S. In this particular, Father complains the lay witness (school counselor) should not have been allowed to opine as to the age of the bruises she observed. Father also complains State's expert witness should have been prohibited from testifying regarding any bruises because he had never observed any bruises on M.M.S. Father next complains the trial court erred in excluding evidence of provocation on the part of M.M.S. resulting in her "discipline" inasmuch as 21 O.S. 1991 §884 does not proscribe use of ordinary force as a means of discipline even when such discipline includes, but is not limited to, "spanking, switching or paddling." Finally, Father asserts he should have been allowed to offer evidence in the form of letters and testimony of a scheme or plan on the part of M.M.S. to fabricate sufficient evidence in order to be placed in the custody of Mother.

Appendix A

¶6 The Oklahoma Child Abuse Reporting and Prevention Act strives to protect children from the infliction of "injury" by any caretaker and permits the adjudication of such injured children as abused and, consequently, deprived. 10 O.S. Supp. 1995 §7102. Unfortunately, the Act does not specifically define "injury" for purposes of the Act's application. Juxtaposed against the Act's prohibited "injury" of children is 21 O.S. §844[1] allowing imposition of "ordinary force" corporal punishment by instrumentation, i.e., "spanking, switching or paddling," by a child or children's caretakers, any of which, it seems to us, could be deemed "injury" dealing as contemplated by the Act. When the Act was passed, however, the legislature specifically did not repeal §844.[2] Thus, and reading the statutes harmoniously as we must, use of ordinary force discipline is permitted, but becomes unlawful and subject to the Act's prohibitions if leading to or resulting in "injury" irrespective of a perceived need for discipline or the child's provocation thereof. *See, e.g., City of Tulsa v. Smittle*, 1985

---

1. That section provides:

> **Ordinary force as a means of discipline not prohibited**
>
> Provided, however, that nothing contained in this act shall prohibit any parent, teacher or other person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling.

2. The legislature repealed only sections 845-848 of title 21, and renumbered those provisions in title 10, §§7102-7105, 7113 as part of the Act.

OK 37, 702 P.2d 367 (where two statutes deal with the same subject matter, one specific and one general, the specific statute controls, with both the general and specific statutory provision given "harmonious" effect); *accord, Beidleman v. Belford*, 1974 OK 72, 525 P.2d 649; *Matter of Guardianship of Campbell*, 1966 OK 99, 450 P.2d 203.

¶7 The relevance and admission of evidence are matters addressed to the sound discretion of the trial court whose rulings thereon will not be disturbed absent a showing of abuse of discretion. 12 O.S. 1991 §§2402, 2403; *Whitely v. OKC Corp.*, 719 F.2d 1051 (10th Cir. 1981); *Cooper v. State*, 1983 OK CR 154, 671 P.2d 1168; *Samara v. State*, 1964 OK 79, 398 P.2d 89. In the present case, Father admitted, and both M.M.S. and C.L.S. corroborated, Father's striking of M.M.S. with a belt and his hand; and the school counselor testified to existence of bruises and welts on the body of M.M.S. The fact that the school counselor was allowed to give her opinion regarding the "age" of the bruises and welts we find immaterial as the counselor's testimony specifically went to the coloration and size of the bruises and welts, arguably relevant to existence of an "injury" as contemplated by the Act. The fact that the state's expert testified concerning the medical aspects of bruising, we likewise find admission of that testimony immaterial, particularly considering Father's corroborated admission that he in fact struck M.M.S. with a belt and his hand. The fact that the Act strictly proscribes "injury" to children, including as we have construed it, injury inflicted in the course of "ordinary force" discipline, thus likewise renders immaterial Father's proffered provocation and scheme evidence.

¶8 Stated otherwise, the Act clearly and unambiguously proscribes injury of a child under any circumstances, i.e., regardless of any provocation or scheme by the child, whether in the course of discipline or otherwise.[3] We therefore cannot say the trial court abused its discretion either in admitting evidence relevant to the existence of an "injury," or in denying admission of Father's provocation/scheme evidence, irrelevant to existence of a proscribed injury to child. Finding no reversible error by the trial court in its evidentiary rulings, we therefore conclude the judgment entered on jury verdict adjudicating M.M.S. and C.L.S. deprived should be and hereby is AFFIRMED. JONES, P.J., specially concurring:

> I agree with the author's analysis of the legislation in question and the result that analysis mandates. I strongly feel that this result should be addressed by the Legislature as I perceive it to be unwise, although mandated by the statutory language.

GARRETT, J., dissents with separate opinion.

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3. If the Legislature did not intend to extend "injury" protection under the Act to situations involving permitted corporal punishment, we leave it to the Legislature to amend the Act appropriately.

Appendix A

THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION I

Case No. 89,784

IN THE MATTER OF M.M.S. and C.L.S.,
alleged deprived children,

STATE OF OKLAHOMA,

Plaintiff/Appellee,

vs.

TIMOTHY SCHOLZ,

Defendant/Appellant.

DISSENTING OPINION

Opinion by GARRETT, Judge:

¶1 I agree with Appellant on all his contentions relating to admission of evidence. The trial court denied Appellant's right to present his defense to the charges leveled against him. I cannot agree.

¶2 The definition of "injury" in the majority opinion, and the application of that definition offends my sense of justice and fair play. In this connection, I vigorously dissent to the

majority view when they read two statutes "together" and then give one a strained construction to the exclusion of the other. If this decision constitutes the law of Oklahoma, then the only evidence required to prove a child is deprived is to show a bruise. Also, in my view, this decision constitutes a judicial repeal of 21 O.S. 1991 §844. Courts should adjudicate, not legislate. I would reverse and remand for a new trial.

¶3 I respectfully dissent.

APPENDIX B — DISPOSITION JOURNAL ENTRY OF THE DISTRICT COURT OF CREEK COUNTY, JUVENILE DIVISION, STATE OF OKLAHOMA DATED JUNE 23, 1997

IN THE DISTRICT COURT OF CREEK COUNTY
JUVENILE DIVISION, STATE OF OKLAHOMA

No. JF-97-34

IN THE MATTER OF:
Melvina Mae Scholz
Crystal Lynn Scholz
Deprived Child(ren).

DISPOSITION JOURNAL ENTRY

On this 23rd day of June, 1997, this case comes on for disposition hearing. The following parties appear in person: Bruce Schultz, Assistant District Attorney, for the State of Oklahoma, petitioner herein; Melvina and Crystal Scholz, the child(ren), with their attorney Shannon Shirley; the mother, Anita Scholz, with her attorney, Larry Click; the father, Timothy Scholz, with his attorney, Fred Greeson; and Kathryn Davis & Ketina Miller appears for the Child Welfare Service of the Department of Human Services. Others present Shirley Scholz (step-mother) Scott Shelton (mother's fiancé) Brenda Smith (North Care Homebuilders' worker).

The court, having received evidence and being fully advised in the premises, FINDS that return of the child(ren) in . . . their father home (✓) is . . . contrary to the welfare of the child(ren).

Appendix B

THE COURT FURTHER FINDS THAT:

(✓) Reasonable efforts have been made to return the child(ren) to the home;

* * *

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that legal custody of the respondent(s) is placed with Department of Human Services until further order of the court. Placement recommended by the court is with their mother.

THE COURT FURTHER ORDERS the following treatment and service plan be obeyed by the respective parties:

BY EACH PARENT AND BY EACH ADULT LIVING IN THEIR HOME:

1. Sign all needed releases of information;

2. Contact assigned case worker at least twice each month;

3. Keep the assigned case worker advised of any changes in telephone and address contact information;

4. Successfully complete all age-appropriate parenting skills course;

Appendix B

5. Father shall visit the children at least one time each month (father's visit shall be professionally supervised)

6. Maintain a home safe and adequate for the children's needs when requesting return placement;

7. Pay child support of $202.46 and $179.54 (father) on the last of each month beginning June 30, 1997, to continue as long as the children are placed outside their home as set forth on the attached Child Support Computation Order;

8. Complete a psychological assessment and follow all recommendations for treatment within 30 days;

9. Complete a substance abuse assessment and follow all recommendations for treatment;

10. Complete a course of domestic violence counseling and treatment;

11. Complete anger management counseling;

12. Complete a comprehensive parenting course such as the nurturing course at the Parent Child Center in Tulsa;

13. Participate in individual and family counseling as recommended by the assigned case worker or

by the person who does their psychological assessment.

14. Use noncorporal discipline on the children.

* * *

BY THE CHILDREN:

1. Upon becoming 13 years old, the child will complete a parenting course designed for teenaged parents.

2. Participate in counseling to address problems of separation from their family as well as the neglect and abuse issues raised in the Petition.

3. Complete domestic violence counseling — Melvina only.

4. Obey the reasonable and lawful directives of the care providers

BY THE DEPARTMENT OF HUMAN SERVICES:

1. Supervise the placement of the children;

2. Make referrals for needed special services;

3. Monitor performance on the service plans;

4. Report to the court;

Appendix B

5. Provide independent living skills training to the children at age 16.

This case is set for review on the 1st day of October, 1997, at 1:30 p.m. The child(ren) and parents are recognized back to that date.

s/ April Sellers White
JUDGE OF THE DISTRICT COURT

APPENDIX C— ADJUDICATION JOURNAL ENTRY OF THE DISTRICT COURT OF CREEK COUNTY, JUVENILE DIVISION, STATE OF OKLAHOMA DATED AND FILED MAY 2, 1997

IN THE DISTRICT COURT OF CREEK COUNTY JUVENILE DIVISION, STATE OF OKLAHOMA

No. JF-97-34

IN THE MATTER OF:
Melvina Mae Scholz
Crystal Lynn Scholz
Alleged Deprived Child(ren).

ADJUDICATION JOURNAL ENTRY AS TO FATHER

On the 21st and 22nd day of April, 1997, this case comes on regularly to be heard on the verified Petition filed by the State of Oklahoma. The following parties appear before the court: Bruce Schultz, Assistant District Attorney, for the State of Oklahoma, petitioner herein; Melvina and Crystal Scholz, the child(ren), with their attorney Shannon Shirley; the mother, Anita Scholz, with her attorney; the father, Timothy Scholz, with his attorney, Fred Greeson; and Kathryn Davis, Ketina Hatcher, appears for the Child Welfare Service of the Department of Human Services.

* * *

The court, being fully advised in the premises and having heard the stipulations and evidence presented, FINDS AS FOLLOWS:

* * *

Appendix C

(✓) The State has met its burden of proof and established by a preponderance of the evidence that the allegations in the Amended Petition are true;

(✓) Jurisdiction and venue are properly laid in Creek County, Oklahoma, because:

(✓) the Uniform Child Custody Jurisdiction Act affidavit has been filed;

(✓) the child(ren) were residing in Creek County at the time of the abuse or neglect;

* * *

(✓) the abuse or neglect of the child(ren) was committed in Creek County.

(✓) The child(ren) are DEPRIVED based on the following findings of fact: Melvina was physically abused by Timothy Scholz, her natural father. Crystal is at risk of abuse and was exposed to violence between Timothy and Melvina Scholz. Anita Scholz is unable to protect the children from this abuse because of the child custody provisions in the Divorce Decree between Anita and Timothy Scholz.

(✓) That the return of the child(ren) to their home (✓) is . . . contrary to the welfare of the child(ren);

Appendix C

(✓) The correct legal name(s) and date(s) of birth of the child(ren) are MELVINA MAE SCHOLZ dob 6-1-82 CRYSTAL LYNN SCHOLZ dob 12-5-86

(✓) That it is in the best interest of the child(ren) and the community that they be made ward(s) of the court.

THE COURT FURTHER FINDS THAT:

* * *

(✓) Efforts to prevent the removal from or to provide for the return of the child(ren) to the home were not made because removal was due to an alleged emergency and was necessary for the child(ren)'s safety; such absence of efforts was reasonable under the circumstances; or

* * *

(✓) The child(ren) are not Indian and are not subject to the Indian Child Welfare Acts;

(✓) The requirements of the Uniform Child Custody Jurisdiction Act (43 Oklahoma Statute 501 et seq.) have been met.

* * *

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Melvina Mae Scholz and Crystal Lynn

Appendix C

Scholz are adjudged to be DEPRIVED and made ward(s) of this court and placed in the custody of Department of Human Services.

IT IS FURTHER ORDERED that this case is hereby set for disposition hearing on the 27th day of May, 1997, at 9:00 a.m. in this court. The child(ren) and parents are recognized back to that date.

s/ April Sellers White
JUDGE OF THE DISTRICT COURT

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DENYING PETITION FOR CERTIORARI DATED AND FILED APRIL 27, 1999

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

No. 89,784

In the Matter of M.M.S. and C.L.S.,
alleged deprived children.
STATE OF OKLAHOMA,

Plaintiffs,

vs.

TIMOTHY SCHOLZ,

Defendant.

ORDER

The Petition for Certiorari previously granted in the above titled cause is withdrawn as improvidently granted. Petition for Certiorari is denied. The opinion of the Court of Civil Appeals, Division 1, is withdrawn from publication.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 26TH DAY OF APRIL, 1999.

s/ Hardy Summer
Chief Judge

ALL JUSTICES CONCUR.

APPENDIX E — ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA GRANTING WRIT OF CERTIORARI DATED AND FILED OCTOBER 12, 1998

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

NO. 89,784

IN THE MATTER OF M.M.S. and C.L.S.,
alleged deprived children,

STATE OF OKLAHOMA,

Appellee,

v.

TIMOTHY SCHOLZ,

Appellant.

ORDER GRANTING WRIT OF CERTIORARI

Petition for Writ of Certiorari is herewith ***GRANTED*** to review Court of Civil Appeals opinion promulgated in the above styled and numbered case, March 10, 1998. Cause is submitted on original briefs filed.

DONE BY ORDER OF THE SUPREME COURT THIS 12th DAY OF OCTOBER, 1998.

s/ [illegible]
CHIEF JUSTICE